STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JON ALAN BONGARD,

Defendant-Appellant.

UNPUBLISHED
October 21, 2003

No. 240809
Hillsdale Circuit Court
LC No. 00-248846-FC

Before: Griffin, P.J., and Neff and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b, two counts of second-degree criminal sexual conduct, MCL 750.520c, and two counts of furnishing alcohol to a minor, MCL 436.1701(1). The trial court sentenced defendant to concurrent terms of seventeen and one-half years to forty years' imprisonment on the first-degree criminal sexual conduct convictions, eight to fifteen years' imprisonment on the second-degree criminal sexual conduct convictions, and sixty days on the furnishing alcohol to minors convictions. Defendant now appeals. We affirm.

Defendant first argues on appeal that he was denied due process of law because the trial court denied his appellate counsel's motion to appoint a second expert witness at public expense. We disagree.

We review a trial court's decision regarding the appointment of an expert witness for an abuse of discretion. *People v Leuth*, 253 Mich App 670, 688-689; 660 NW2d 322 (2002); *People v Herndon*, 246 Mich App 371, 399; 633 NW2d 376 (2001).

Here, the trial court refused to provide funds for defendant to hire a second deoxyribonucleic acid (DNA) expert to help appellate counsel evaluate whether DNA testing procedures used in this case were faulty and whether trial counsel was ineffective by agreeing with defendant's first DNA expert and in choosing not to call the expert at trial. Defendant's expert had determined that the police had properly followed testing procedures and did not recommend an additional testing of the samples. Defendant's trial counsel chose not to call the expert to testify at trial, a decision that defendant acquiesced in on the record.

At the hearing on defendant's motion requesting funds for a second expert, the trial court stated:

> Clearly, the Court recognizes that an indigent defendant is entitled to expert assistance, assistance by an expert. In this particular case, the DNA. That is why the court specifically ordered – and ordered the county to pay for a DNA expert on behalf of Mr. Bongard prior to trial. All materials were turned over to that expert. There were numerous conversations and exchange of correspondence between defense counsel and the DNA expert. In fact, as I recall, there was a colloquy between defense counsel, defendant, and myself regarding this DNA expert on the record. It was the DNA expert's opinion, as I recall, without looking at the transcript, that he concluded that there was nothing irregular about the DNA analysis and saw no reason to attempt to attack the same. Defense counsel and defendant both concluded that they saw no need to continue with the DNA expert and waived his appearance at trial. If they're satisfied, clearly it satisfies me.
>
> There is absolutely no reason to appoint another expert to review the expert I already appointed for the defendant for appellate purposes and [I] would deny that requested relief.

Under the circumstances, we find no abuse of discretion in the trial court's refusal to appoint a second DNA expert. In requesting an expert witness at the expense of the state, a defendant must show "to the satisfaction of the judge . . . that there is a material witness in his favor . . . without whose testimony he cannot safely *proceed to trial*." MCL 775.15 (emphasis added); *Leuth, supra* at 688. Defendant cites no authority to support his claim that due process of law entitles him to a second expert, at state expense, to assist in his appeal. See *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999) ("A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim.").

Moreover, given that a defendant is not entitled to have a DNA expert at trial without making a particularized showing of a need for an expert, *People v Leonard*, 224 Mich App 569, 582; 569 NW2d 663 (1997), there certainly can be no entitlement to an expert to evaluate the issues for appeal without such a showing. Defendant herein has offered only mere speculation regarding the unreliability of the testing, especially in light of the fact that he did have an expert who opined the testing was reliable.

Furthermore, in the context of claims of ineffective assistance of counsel, it is well-established that decisions regarding what evidence to present and whether to call or question witnesses, including expert witnesses, are presumed to be matters of trial strategy. *People v Ackerman*, 257 Mich App 434, 455; ___ NW2d ___ (2003); *People v Davis*, 250 Mich App 357, 368-369; 649 NW2d 94 (2002); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999); *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Thus, even if defendant obtained a second expert who opined that the first expert erred in his conclusion that there was no basis to challenge the prosecution's DNA test results, trial counsel's decision not to call the first expert was a matter of trial strategy that was not assailable on appeal. We note that defendant specifically agreed on the record with the decision not to engage in further DNA testing or to have the expert testify. We therefore conclude that the trial court did not abuse its discretion in denying defendant's motion requesting funds for a second DNA expert to assist on appeal.

Defendant next contends that his convictions on two separate counts of second-degree criminal sexual conduct for multiple sexual contacts (touching the victim's breast and genital area) that were part of the same criminal incident violate his double jeopardy protections because these convictions amounted to multiple punishments for a single transaction or crime. Defendant acknowledges that in the case of first-degree criminal sexual conduct, where there is more than one penetration, each may be punished separately even if the acts occurred during one continuous criminal transaction. See *People v Dowdy*, 148 Mich App 517, 521; 384 NW2d 820 (1986). However, defendant argues that the same is not true of multiple touchings under the second-degree criminal sexual conduct statute, MCL 750.520c. We disagree.

As a preliminary matter, defendant admits he did not raise the present argument at trial; thus, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 760; 597 NW2d 130 (1999). Reversal is warranted only when the plain forfeited error results in a conviction of an innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

> A double jeopardy challenge involves a question of law that this Court reviews de novo. *People v Kulpinski*, 243 Mich App 8, 12; 620 NW2d 537 (2000). Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. The Double Jeopardy Clauses safeguard against both successive prosecutions for the same offense and multiple punishments for the same offense. In the multiple punishment context, the clauses seek to ensure that the defendant's total punishment will not exceed the scope of punishment provided by the Legislature. *People v Whiteside*, 437 Mich 188, 200; 468 NW2d 504 (1991). The Legislature's intent constitutes the determining factor under both the federal and the Michigan Double Jeopardy Clauses. *People v Denio*, 454 Mich 691, 706; 564 NW2d 13 (1997). Thus, our analysis of this issue requires our consideration "whether there is a clear indication of legislative intent to impose multiple punishment for the same offense." *People v Mitchell*, 456 Mich 693, 696; 575 NW2d 283 (1998). [*People v Dillard*, 246 Mich App 163, 165; 631 NW2d 755 (2001).]

In *Dowdy*, *supra* at 521, this Court examined whether the Legislature intended to separately punish each act of penetration as separate first-degree criminal sexual conduct charges and reasoned:

> From the face of the statute [MCL 750.520b], it appears that the gravamen of first-degree criminal sexual conduct is sexual penetration accomplished under any of the enumerated circumstances. *People v Johnson*, [406 Mich 320] *supra* at 330 [279 NW2d 534 (1979)].
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> In light of the language and focus of the statute, we believe the Legislature intended to punish separately each criminal sexual penetration. . . . The offense of first-degree criminal sexual conduct has been completed after sexual penetration has occurred by any one of the enumerated circumstances. From the language of the statute, it appears that the Legislature intended to authorize separate punishment for each completed sexual penetration. We conclude that defendant's

> sentences for five acts of penetration are not for the "same offense" and therefore no double jeopardy violation is shown.
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> In accord, *People v Wilson*, 196 Mich App 604, 608; 493 NW2d 471 (1992).

The rationale of *Dowdy* is equally applicable to the present case. MCL 750.520c(1) provides that "[a] person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person [under certain proscribed circumstances]." "Sexual contact" is defined to include "the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner. . . ." MCL 750.520a(n). The language of the statute indicates that second-degree criminal sexual conduct has been accomplished as soon as sexual contact takes place and, where there is more than one touching of or contact with the victim's intimate parts, each contact may give rise to separate charges and punishment.

Here, there was evidence that defendant sat the victim on his lap, lifted up her shirt and bra, and kissed her breasts, ignoring her request to stop. Later, he picked the victim up, put her on a bed, and placed his fingers in her vagina. While the touchings took place in close proximity in time, each constituted a separate touching of a different area of the victim's body; one was not a natural progression of the other. Under these circumstances, we conclude that touching the victim's breast may have been part of the same criminal transaction, but it was not part of the same criminal offense of touching the victim's vaginal area. In light of our conclusion that under MCL 750.520c a defendant may be convicted and punished for each separate act of sexual contact and because, factually, there was evidence in the instant case of two separate sexual contacts, defendant's convictions on two counts of second-degree criminal sexual conduct stemming from an incident with one victim did not constitute multiple punishments for the same offense. Defendant has not demonstrated plain error affecting his substantial rights. *Carines, supra*.

Affirmed.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Christopher M. Murray